STATEMENT OF THE CASE

Jurisdiction in the court of first instance, the United States District Court for the Southern District of New York, was based upon 15 U.S.C. § 78aa. Jurisdiction in the United States Court of Appeals for the Second Circuit was based upon 28 U.S.C. § 1291.

Stockholder approval of stock options is almost always sought these days for corporations with publicly traded stock. Although it is ordinarily not required by federal securities law or state corporation law, it can be required by tax laws and the rules of the stock markets. This case questions what disclosure corporate stockholders must get when the board of directors solicits their approval of a stock compensation plan. For corporate executives, especially, stock-based compensation is a substantial part of their pay, excessive or not. At Boeing, the corporation in this case, the annual cost for stock-based pay was $576 million in the year ended December 31, 2004.

The language of the applicable regulation requires a statement of the number of shares "underlying such options." 17 C.F.R. § 240.14a-101 (Item 10(b)(2)(i)(A)). (23a). The lower court held that the requirement to state the "underlying" was met by stating the number of "issuable" shares in the Plan. (6a-7a). We say that "issuable" is different from "underlying," and that the meaning of those words is central to this case. We submit that reporting issuable shares does not comply with the regulations, and that it is worse than useless.

Since the 1930's federal law has required the disclosure we seek at bar. The policy behind this requirement is strong

as ever, and it was explained on August 10, 2005, by the Chairman of the SEC, Christopher Cox, in an interview on television on the Nightly Business Report. He was asked whether the SEC was going to do something about "[r]unaway executive pay." (28a). He said that controlling excessive compensation was the job of the stockholders, but for them "to do that, they've got to have good information." (29a).

This case is one of a great many instances of violations of this precise requirement of 17 C.F.R. § 240.14a-101 (Item 10(b)(2)(i)(A)) and (Item 20) by big corporations (and also medium and small corporations). The facts at bar are not isolated.

For the 2003 annual meeting of Boeing's stockholders, Boeing's board of directors solicited the stockholders to give their proxies to vote to approve The Boeing Company 2003 Incentive Stock Plan (the "Plan") by use of the Notice of Annual Meeting and the Proxy Statement. The Plan was described in a Proxy Statement that was attached to the notice of that meeting. All the defendants permitted the use of their names in the Proxy Statement.

The Proxy Statement did not state the number of shares underlying options and other stock based awards. Instead, the Proxy Statement reported "the number of shares available for issuance," which it expressly explained to mean shares that "are actually issued and delivered." One problem with stating shares "for issuance" instead of "underlying" shares is that under this Plan all stock based awards can be settled in cash, so a statement of issuable shares is of only illusory importance, and even worse, there is in actual reality no limit on the number of shares underlying options and other stock

based awards and cash settlements that this Plan and other plans allow.

At bar, the Proxy Statement reported that 30 million and for some purposes an additional 3 million shares could be issued under the Plan. Suppose, however, that the Proxy Statement had reported that no shares would be issued to satisfy options and other awards contained in the Plan. A stock option plan can work perfectly well without issuable shares, because options can be settled in cash without issuing shares. But it cannot work at all without underlying shares because, by definition, the underlying shares are what are subject to the option. At bar, a statement that no shares would be issued would be as informative as saying that 30 or for some purposes 33 million shares would be issued. That is, the 30 million shares issuance disclosure did not provide the stockholders with the good information that SEC Chairman Cox said "they've got to have." (29a).

There is a second problem with stating shares "for issuance" instead of "underlying" shares, namely, the financial consequences to Boeing when it grants stock options and other stock based awards. These consequences exist whether or not it ever actually issues and delivers the underlying shares or settles options in cash. Since 1996, Boeing has accounted for stock options by measuring the value of stock options on the date of grant by means of an option pricing model, *e.g.*, Black-Scholes, which won the 1997 Nobel Prize in Economic Science, or a binomial model. That value is the compensation cost, and it is reported as an expense on the corporation's statement of operations. Boeing recognizes that cost as an expense against revenues whether or not the option is exercised and whether or not any shares of stock are actually issued and delivered. If an expensed

stock option expires unexercised, accounting rules forbid reversal of the expense. In addition, the Plan allows shares underlying options that are forfeited or that expire or that are redeemed upon exercise as purchase price to be re-used to underlie new options, even if the option has been expensed. This re-use can produce additional expense. There is no limit to the amount of expense that this Plan can produce. The financial consequences to Boeing of this expense underscore the importance of the requirements of 17 C.F.R. § 240.14a-101 Schedule 14A (Item 10(b)(2)(i)(A)) and (Item 20), to state the number of shares underlying options and not the number of shares that can be issued and delivered when options are exercised. This accounting treatment is consistent with the supporting economic science. Now, all corporations subject to SEC reporting account for stock options in this way.

It is only the number of shares underlying options and other stock based awards that determine the financial consequences to the corporation under the accounting rules. It is only the number of underlying shares that determines the cost of cash settlements. This is the way the world evaluates stock option plans, and without stating the underlying, no one can make that evaluation.

As we said, Boeing's expense for stock-based pay in the year 2004 was $576 million. In 2002, the last full year before the vote to approve the Plan, it was $447 million. Failure to state the number of underlying shares guaranteed that no one could have foreseen this 28 percent increase in two years. The number of issuable shares has no effect on producing the $576 million expense. Without knowing the number of underlying shares, stockholders can only guess at the expenses of a stock option plan and the cost of cash settlements, for there is no limit to them.

REASONS FOR GRANTING THE PETITION

I. *Introduction*

The lower court has decided an important question of federal law. Its precise holding has not been, but should be, settled by this court. Also, it decided that question in a way that conflicts with relevant decisions of this court. In some ways, its decision conflicts with decisions of other United States courts of appeals.

The questions are important, for as SEC Chairman Cox recently said, it is the job of corporate stockholders and not that of the federal government to "discipline executive compensation," but they can do that job only if they "have good information." (29a). The lower court's decision stanched that good information and made it impossible for stockholders to decide how to vote on stock plans and thereby discipline executive compensation. Moreover, this Proxy Statement is not an isolated example. This non-disclosure practice is widespread, so that the petition should be granted. *Corn Products Refining Co. v. FTC*, 324 U.S. 726, 730 (1945); *see FTC v. Cement Institute*, 333 U.S. 683, 722 (1948).

The importance of the question presented is based on both the legal consequences of the correct construction of the regulation and the economic effects on an urgent social conflict, i.e., corporate compensation in the United States and whether it can be fairly approved by stockholders if this current disclosure practice is allowed to persist.

Finally, the lower court so far departed from the accepted and usual course of judicial proceedings as to call for an

exercise of this court's supervisory power. Specifically, in applying the plain meaning rule to the language of a federal regulation, it quoted the language of that regulation, including the word "underlying" (5a), but then it deleted the word "underlying" and substituted the word "issued" (7a), a word of different meaning, to arrive at an incorrect construction.

II. *The Legal Importance Of The Question*

A. *Governing Principles*

In *J.I. Case Co. v. Borak*, 377 U.S. 426, 431-32, 84 S. Ct. 1555 (1964), this Court cited the reports of the Senate and the House of Representatives that recognized "the recurrence of abuses which . . . [had] frustrated the free exercise of the voting rights of stockholders." It observed:

> Too often proxies are solicited without explanation to the stockholder of the real nature of the questions for which authority to cast his vote is sought.

In *Shaev v. Saper*, 320 F.3d 373, 378-79 (3rd Cir. 2003), the court cited *Borak* and addressed the importance of "fair corporate suffrage," the harm caused by "inadequate disclosures in proxy solicitations," and the remediation provided by § 14(a) of the Securities Exchange Act, 15 U.S.C. § 78n(a). (22a). It was recently reiterated that 15 U.S.C. § 78n(a) was enacted to fill the vacuum of state law that had "done 'virtually nothing to cope with the problem' of managerial abuses in soliciting proxies." Mark J. Roe, *Delaware's Competition*, 117 Harv.L.Rev. 588, 612 (2003).

In *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1097, 111 S. Ct. 2749 (1991), this court held that the principal purpose of a proxy statement "should be to inform, not to challenge the reader's critical wits." It also held that a proxy statement should not make the stockholders into "unwitting agents of self-inflicted damage." (501 U.S. at 1103) In *Shaev v. Saper*, *supra*, 320 F.3d at 379, 382, the court applied this precise language of this court to a proxy statement seeking stockholder approval of a cash bonus plan of corporate compensation. It held that the prevention of stockholders' "authorizations for corporate actions by means of deceptive or inadequate disclosures in proxy solicitations . . . is a highly important rule in the corporate life of this nation." 320 F.3d at 379 [citations omitted]. It is a rule that should receive emphasis. *No. 84 Employer Teamster Fund v. America West Holding Corp.*, 320 F.3d 920, 946 (9th Cir. 2003); *Houbigant, Inc. v. Deloitte & Touche, LLP*, 753 N.Y.S.2d 493, 498 (1st Dept. 2003).

Materiality is not an element of the question presented. However, as to materiality, the statement of the number of shares underlying options is expressly required by 17 C.F.R. § 240.14a-101 (Item 10(b)(2)(i)(A)) and (Item 20), so it is "presumably material." *In re Craftmatic Sec .Lit.*, 890 F.2d 628, 641, n.17 (3rd Cir. 1989); Brudney, *A Note On Materiality and Soft Information Under the Federal Securities laws*, 75 Va.L.Rev. 723, 727 (1989).

This Plan and its presentation in the Proxy Statement are like the company that raised capital "for carrying on an undertaking of great importance, but nobody to know what it is." Loss, I *Securities Regulation* at p.4 (2nd Ed. 1961, Little, Brown & Co).

B. *The Proxy Statement Must Disclose The Number Of Shares Underlying The Options In The Plan*

The lower court held that construction of a regulation is similar to interpreting a statute, and "we must begin by examining the language of the provision at issue." (7a) *See, also, Burns v. Barnhart*, 312 F.3d 113, 125 (3rd Cir. 2002) ("Our starting point in cases of statutory construction must be the language employed by Congress.") That language is given its ordinary meaning. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982). The regulation 17 C.F.R. § 240.14a-101, Schedule 14A, begins with the language, "Information required in proxy statements." Item 10(b)(2)(i) expressly requires "With respect to . . . any plan containing options . . . submitted for security holder action, state (A) the title and amount of securities underlying such options. . . ." (23a). The key language in that regulation is the word "underlying." Stating a number of issuable shares, rather than underlying shares, is in violation of this item because they are things different in kind, as well as in degree. Deriving the meaning of the word "underlying" should be done "in the light of the 'object and policy' of the statute." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 47 (1989). Stating only issuable shares frustrates the purpose of the statute and the SEC regulations, for it will force corporations to grant options underlain by an unlimited number of shares.

The SEC adopted this form of language for Item 10(b)(2)(i)(A) in SEC Rel.No. 34-31327, *Executive Compensation Disclosure*, 1992 WL 301259 *30, *59, (October 16, 1992). Previously, instead of "amount of securities underlying such options," Schedule 14A read "amounts of securities called for or to be called for by such

options." SEC Rel.No. 34-4775, Schedule 14A, Item 11(a)(i), 1952 WL 5254 at *15 (Dec. 11, 1952), (24a-25a). Before that it said "amount of securities called for by the option." SEC Rel. No. 34-1823, Schedule 14A, Item 9(d)(1), 1938 WL 33169 at *10 (Aug. 11, 1938) (26a). Item 20 (24a) is entitled, "Other proposed action," and in relevant part it requires:

> If action is to be taken on any matter not specifically referred to in this Schedule 14A, describe briefly the substance of each such matter in substantially the same degree of detail as is required by Items 5 to 19, inclusive, of this Schedule.

No other provision of Schedule 14A addresses requirements for stating the number of shares underlying stock appreciation rights, restricted stock, stock units, performance shares, performance units, and other stock based awards, which are authorized by the Plan and many other plans, as well. We submit that Item 20 requires the proxy statement to state the number of shares underlying awards other than stock options as if they were addressed in Item 10(b)(2)(i)(A).

1. The Meaning Of The Regulatory Word "Underlying"

The regulation, at Item 10(b)(2)(i)(A)), requires the Proxy Statement to state the title and amount of securities underlying such options contained in a plan submitted for security holder action. (23a). At bar, that means the number of shares of common stock subject to such options, not the number of shares available for issuance. The circuits have consistently denominated the stock subject to an option as

the underlying stock or security. *SEC v. Yun*, 327 F.3d 1263, 1268, n.6 (11th Cir. 2003); *Caiola v. Citibank, N.A.*, 295 F.3d 312, 316-17, 325, 327 (2nd Cir. 2002); *Keeler v. Comm.*, 243 F.3d 1212, 1216, 1219 (10th Cir. 2001); *Deutschman v. Beneficial Corp.*, 841 F.2d 502, 504 (3rd Cir. 1988); *see Laureys v. Comm.*, 92 T.C. 101, 102, 1989 WL 4225 (1989) (stock subject to an option "is called the underlying security"). In *Varghese v. Honeywell International, Inc.*, 424 F.3d 411, 414, n.3 (4th Cir. 2005); in *Kerkhof v. MCI WorldCom., Inc.*, 282 F.3d 44, 53 (1st Cir. 2002), and in *Scully v. U.S. WATS, Inc.*, 238 F.3d 497, 511 (3rd Cir. 2001) the courts referred to the stock subject to an employee's compensatory stock option as the "underlying security" or "underlying stock."

Reference by courts to the stock subject to the option as "underlying" is consistent with financial terminology, even if the option is settled in cash and the stock is not delivered. *Barron's Dictionary of Finance and Investment Terms*, p.756 (6th ed. 2003); Cox, Hillman, Langevoort, *Securities Regulation, Cases and Materials*, p.1112 (3rd ed., Aspen, 2001); Chriss, *Black-Scholes and Beyond: Option Pricing Models*, pages 11-13 (Irwin 1997).

The word "underlying" must be distinguished from the word "issued," for it has an unrelated meaning. The shares underlying an option granted by a corporation are not "issued" shares. It is only when the shares are placed in the hands of a shareholder that the company will have issued them. *Staar Surgical Co. v. Waggoner*, 588 A.2d 1130, 1136-37 (Del. 1991) (stock is not issued until exercise of conversion option or until board acts with formality required by 8 Del.C § 151); *see Anadarko Petroleum Corp. v. Panhandle Eastern Corp.*, 545 A.2d 1171, 1175-77 (Del. 1988) (market purchase

of stock on "when-issued" basis does not make purchaser a stockholder). Typically, the word "transfer" means that one person assigns rights in property to another person. *Black's Law Dictionary*. However, the corporation does not "own" its stock (*see Decker v. Advantage Fund Ltd.*, 362 F.3d 593, 596 (9th Cir. 2004)), and it does not transfer its stock. The word "issue" imparts the concept of transfer to this transaction. The holder of an option to buy stock is not a stockholder. *Helvering v. Southwest Consol. Corp.*, 315 U.S. 194, 200-01, 62 S. Ct. 546 (1942); *Harff v. Kerkorian*, 324 A.2d 215, 219 (Del. Ch. 1974), *affd.*, 347 A.2d 133, 134 (Del. 1975). Accordingly, the stock underlying an employee stock option has not been issued, and it might never be issued.

Use of the word "underlying" instead of "issued" or "issuance" or "issuable" in 17 C.F.R. § 240.14a-101 (Item 10(b)(2)(i)(A)) is consistent with the way options and similar financial instruments, sometimes called "derivative securities" or simply "derivatives," are treated in the real world, i.e., it is a longstanding practice to settle them in cash, or to make a covering trade, without physical delivery or transfer (Joseph L. Sax, "*Options Traders, Rule 10b-5, and Standing: Making Sense of It All*," 67 N.C.L.Rev. 1123, 1156 (1989)).

For stock options that are settled in cash, no shares will be issued. In *Caiola v. Citibank, N.A., supra*, 295 F.3d at 316-17, 325, 327, the court addressed synthetic, cash settled, stock options, referring to the stock that was subject to the option as the "underlying security" or the "underlying asset," and held that cash settled stock options were the same as stock options "settled by physical delivery," except that there is no physical delivery of stock when options are settled in cash. The cash settlement of an option is substantially

identical to the "cancellation" of an option, whereby no securities are transferred and cash is paid "equal to the difference between the contract [or exercise] price of the [underlying] security and its market price at the time of cancellation." *Stoller v. Comm.*, 994 F.2d 855, 856 (D.C. Cir. 1993); *see Wolff v. Comm.*, 148 F.3d 186, 189-90 (2nd Cir. 1998) (agreeing with *Stoller*, that "cancellation" of a forward contract for consideration is not a "sale").

As the foregoing cases show, exercise of an option can produce costs to the corporation even if it never issues the underlying stock.

2. The Duty To State A Limit Of Underlying Shares

The Proxy Statement actually states no limit on the number of shares underlying options. The regulatory requirement to state the amount of underlying shares requires the ascertainment of that amount. It cannot be left to future decision, and it is not a speculative prediction. The provision to state the amount of securities underlying options, in 17 C.F.R. § 240.14a-101 (Item 10(b)(2)(i)(A)) does not contain any requirement that it be determinable, as does 17 C.F.R. § 240.14a-101 (Item 10(b)(2)(ii)). (23a). This means, we submit, that said amount must be fixed by the terms of the "specific grant" or the "plan." Until the lower court held otherwise, (10a-11a), no other authority doubted it.

In *Allyn Corp. v. Hartford National Corp.*, 1982 WL 1301 at *27 (D.Conn. March 30, 1982), the court held that when Schedule 14A requires disclosure of "material features" and "general effects" of a proposed merger, it imposes

> "a requirement that the 'material features' and 'general effect[s]' be negotiated or be ascertainable by a time certain. . . . [T]he requirement to disclose generally presupposes that there is something in existence that can be disclosed. . . . [It] may [not] be avoided altogether by the artful delay of the action that is the apparent predicate to the required disclosure. . . . [The rules] cannot be woodenly applied to frustrate the simple statutory and regulatory objective of making available to shareholders basic information. . . ."

See 1982 WL 1301 at *27 n.12, concerning the strong policies supporting disclosure which one court has recently reconfirmed, *Shaev v. Saper*, *supra*, and the accompanying text that these are:

> . . . the basic principles of disclosure and fiduciary responsibility which underlie the 1934 Act and which are the hallmarks of the American system of corporate democracy.

The court also said (1982 WL 1301 at *27), "That 'disclosure' rules may impose 'substantive' requirements on corporations is not an entirely novel idea. [Citations omitted.]" We submit that this principle is applicable to the Proxy Statement at bar, even though *Allyn* addressed the requirement to identify directors instead of the number of shares underlying options in a new plan.

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We submit that *Allyn* deserves a broad reading. As authority for its decision, 1982 WL 13012 at *27, it said:

> *See, e.g.*, 2 L. Loss, *Securities Regulation* (1961) at 889, *quoting* Caplin, "Proxies, Annual Meetings and Corporate Democracy: The Lawyer's Role," 37 *Va. L. Rev.* 653, 667 (1951) ("In addition to requiring an adequate disclosure of pertinent information, the proxy rules are inevitably effecting, albeit in a negative way, the establishment of minimal standards of conduct for management[.]")

We submit that *Allyn's* use of "*e.g.*" means that the court considered the principle or rule to be well established. Professor Loss was addressing all of Schedule 14A, 17 C.F.R. § 240.14a-101. Professor Caplin was addressing the entire subject of proxy statement disclosure. We submit that the Caplin article and the Loss treatise support a broad application of *Allyn*. Moreover, the *Allyn* court itself did not suggest that it was formulating a narrow rule addressing only disclosure of directors.

State corporation laws require corporations to have a maximum number for the amount of authorized shares. This number can only be changed by approval of directors and stockholders by amending the certificate of incorporation. However, state corporation laws generally do not limit the number of shares underlying options that can be granted. This oversight in state law is remedied by 17 C.F.R. § 240.14a-101 (Item 10(b)(2)(i)(A)) and (Item 20). Mark J. Roe, *Delaware's Competition*, 117 Harv.L.Rev. 588, 612 (2003) (Stockholder voting, the core of corporate law, is pervasively controlled by federal law and SEC regulation

because the states had done virtually nothing to curb managerial abuses in soliciting proxies).

The disclosure practices exemplified in this Proxy Statement frustrate the purpose of the SEC regulations, for corporations can now be forced to grant options on an unlimited number of underlying shares, something that the regulation forbids. If a corporation grants options to buy more of its shares than it is authorized to issue, it must settle that excess in cash. *Helvering v. Southwest Consol. Corp.*, *supra*, 315 U.S. at 201. The case of *Allyn Corp. v. Hartford National Corp.*, *supra*, is consistent with the SEC's disclosure requirement.

III. *The Economic Importance Of The Question*

These days, many corporate boards of directors are soliciting stockholder approvals of stock option plans and stating the number of shares for issuance instead of the number of shares underlying options. It is so prevalent a practice that it is difficult to find a solicitation that does it as required by 17 C.F.R. § 240.14a-101 (Item 10(b)(2)(i)(A)). It occurs in large corporations, *e.g.*, The Home Depot, Inc., a Delaware corporation, (market capitalization approximately $86 Billion (2.1 billion shares at $41/share)), small cap corporations, *e.g.*, Datascope Corp., a Delaware corporation, (market capitalization, approximately $510 Million (15 million shares at $34/share)), corporations in-between *e.g.*, Medco Health Solutions, Inc., a Delaware corporation, (market capitalization approximately $15 Billion (307 million shares at $51 share)), and very large corporations, *e.g.*, Exxon Mobil Corporation, a New Jersey corporation, (market capitalization $353 Billion (6.2 Billion shares at $57/share)).

It is hard to find exceptions, but they must exist, *e.g.*, Hewlett-Packard Company, a Delaware corporation (market capitalization $78 Billion (2.8 Billion shares at $28/share)). Its 2004 Stock Incentive Plan at ¶3(a), does not use the word "issuable" and instead provides that there are 180 million shares subject to Awards (including options). It is silent about cash settlements and provides that shares subject to Awards that are cancelled, expire or are forfeited shall not be available for re-grant. This provision in the 2004 plan reversed the provision in its 1995 plan, which did allow for re-grants. The new language is not perfect, but it achieves significant improvement over the Boeing language.

In his television interview, SEC Chairman Cox suggested that the SEC would in the near future change the rules of compensation disclosure to provide one aggregate number of compensation for comparison. (28a). This is an approach already in use in recent years by many corporate compensation committees. Bachelder, "*Executive Compensation – Compensation Committees : Tally Sheets and Other Issues*," *New York Law Journal*, October 20, 2005, page 3, column 1. However, it will not solve the problem at bar. In proxy statements the disclosure of corporate compensation relates to prior years. It is only where stockholders are solicited to approve stock compensation plans that the SEC regulations require that a proposal must determine and disclose a present undertaking for the future by stating the number of shares underlying options and other awards contained in that plan. Chairman Cox in his interview mentioned no plans of the SEC to revisit this kind of disclosure, but then the regulations have been clear since 1938.

IV. *This Court Should Exercise Its Supervisory Power*

The supervisory power of this court over the United States courts of appeals vests it with the authority "to prescribe the method by which those courts go about deciding the cases before them." *Lehman Brothers v. Schein*, 416 U.S. 386, 393 (1974) (concurring opinion of Rehnquist, J., *citing Western Pacific R. Corp. v. Western Pacific R. Co.*, 345 U.S. 247 (1953)). We submit that the case at bar is a good candidate for such review.

The lower court held, (7a):

> Item 10 plainly requires the disclosure of those securities that could be issued to satisfy Boeing's obligation to deliver shares under the Plan when an option-holder exercises options.

However, 17 C.F.R. § 240.14a-101 (Item 10(b)(2)(i)(A) uses the word "underlying," which the lower court quoted (5a). The sub Item in question does not say to state the shares that could be issued. It does not use the word "issued." Substituting the word "issued" for the word "underlying" breaks the rule that a regulation should be construed according to its language, and it substitutes a word of vastly different meaning. The lower court conferred a meaning on the word used in the regulation that is disconnected from the way the courts and the financial community use the word "underlying." This, we submit, is a page from the chapter on "Humpty Dumpty" in Lewis Carroll's *Through The Looking Glass.*

The lower court did one more wayward thing. It held that, as used in 17 C.F.R. § 240.14a-101, Schedule 14A (Item

10(b)(2)(i)(A)), the language "amount of securities underlying such options" means something different from the language "amount of such options" as used in 17 C.F.R. § 240.14a-101 (Item 10(b)(2)(ii)). (6a, 23a). In fact the world understands that those two phrases have identical meaning, as do the courts. *Cochran v. Quest Software, Inc.*, 328 F.3d 1 (1st Cir. 2003); *Seinfeld v. Bartz*, 322 F.3d 693 (9th Cir. 2003); *Seinfeld v. Bartz*, 2001 WL 611295 (S.D.N.Y 2001). Such usage is ingrained in the minds of the corporate community. Once, some years ago at a deposition, the CEO was confronted with a fairness opinion from a stock broker that disclosed that it had bought 2,985 listed call options. The CEO was asked how many shares of stock that represented, and he answered 2,985 shares. These were listed stock options that were traded on an exchange in 100 share contracts, *Laureys v. Comm.*, *supra*, 92 T.C. at 103, 110-11, so the correct answer was 298,500 shares. But the CEO's answer was governed by reflex and habit. In construing the meanings of the words used in the regulation, the lower court rejected their ordinary meanings.

CONCLUSION

A petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED APRIL 14, 2005

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term 2004

(Argued: February 14, 2005 Decided: April 14, 2005)

Docket No. 04-3475-cv

LEATRICE SEINFELD,

Plaintiff-Appellant

—v.—

PAUL E. GRAY, JOHN F. MCDONNELL, JOHN M. SHALIKASHVILI, HARRY C. STONECIPHER, JOHN BIGGS, JOHN E. BRYSON, ROZANNE L. RIDGWAY, PHILIP M. CONDIT, KENNETH M. DUBERSTEIN, W. JAMES MCNERNEY, LEWIS E. PLATT, THE BOEING COMPANY,

Defendants-Appellees.

Before

SOTOMAYOR and KATZMANN, *Circuit Judges*, and CEDARBAUM, *District Judge*.[1]

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1. Hon. Miriam Goldman Cedarbaum, United States District Judge for the Southern District of New York, sitting by designation.

Appendix A

KATZMANN, Circuit Judge:

Plaintiff-appellant Leatrice Seinfeld appeals from the judgment of the United States District Court for the Southern District of New York (Brieant, *J.*), granting the defendants' motion to dismiss the Verified Amended Complaint under Fed.R.Civ.P. 12(b)(6). Seinfeld argues that a compensation plan proxy statement issued by The Boeing Company ("Boeing") violates SEC regulations. According to Seinfeld, the proxy statement is misleading because it does not inform investors that the number of options that could be issued under the plan is not limited by the plan's restriction on the number of shares of stock available for issuance under the plan. For the reasons that follow, we affirm the judgment of the district court.

Background

Unless otherwise noted, the following facts are based on the allegations in the Verified Amended Complaint.

In March 2003, Boeing's Board of Directors solicited proxies to approve Boeing's 2003 Incentive Stock Option Plan ("the Plan") at Boeing's 2003 annual meeting. The Plan permits the grant of stock options to Boeing's employees and directors.

Leatrice Seinfeld, the plaintiff-appellant, argues that the disclosure associated with the Plan—the proxy statement—was materially misleading. Stockholders were not specifically informed that the limit on the number of shares available for issuance under the Plan did not constrain the number of

options that Boeing might issue under the Plan to employees and directors. Mainly, this was because the options could be settled in cash, allowing Boeing to issue options without ever requiring that shares issue. Seinfeld asserts that Boeing failed to state the true cost of the Plan by not specifically informing investors that the number of options that could be issued under the Plan was unconstrained by any limit on the number of shares that could be issued. The defendants-appellees respond that no investor would have read the proxy statement to mean that there was such a limit on the number of options that could be issued under the Plan, and argue that they were not required to state the number of options that might be issued.

The proxy statement explains that:

> The aggregate number of shares of Boeing stock available for issuance under the 2003 Plan will not exceed 30 million, which represents approximately 3.75% of the currently outstanding shares of Boeing stock eligible to vote as February 28, 2003. The Board of Directors, in its sole discretion, may increase the aggregate number of shares of Boeing stock available for issuance under the 2003 Plan by an additional three million shares if, in the future, Boeing acquires another company and substitutes Awards for the acquired company's outstanding stock option or equity award commitments or otherwise grants Awards in connection with the acquisition.

Appendix A

The proxy statement includes additional language clarifying, *inter alia*, the status of shares issued in support of an option or other award if the award is not exercised:[2]

> Shares covered by an Award will not count against the shares available for issuance under the 2003 Plan until they are actually issued and delivered to a Participant. If an Award granted under the 2003 Plan lapses, expires, terminates or is forfeited, surrendered or canceled without having been fully exercised or without the issuance of all of the shares subject to the Award, the shares covered by such Award will again be available for use under the 2003 Plan. In addition, shares that are (i) tendered by a Participant or retained by the Company as payment for the purchase price of an Award or to satisfy tax withholding obligations, (ii) covered by an Award that is settled in cash, or (iii) reacquired by the Company on the open market using cash proceeds received by the Company from the exercise of Stock Options, will be available for issuance under the 2003 Plan.

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2. A portion of the proxy statement pertains to the Compensation Committee's discretionary powers in the case of stock splits, spin-offs, or certain other changes to Boeing's corporate or capital structure. Under these circumstances, the Committee may "equitably adjust[ ]" the pool of shares underlying the 2003 Plan. When pressed at oral argument regarding whether this discretion was itself a violation of Item 10, plaintiff's counsel stated that the phrase "equitably adjust[ ]" is a term with settled meaning which does not give unfettered discretion to the Compensation Committee.

Appendix A

Seinfeld sued the defendants-appellees in October 2003, asserting that (1) the proxy statement violates Item 10 of SEC Rule 14a-101, which governs proxy statements relating to cash or noncash compensation plans, and (2) the proxy statement is materially misleading under SEC Rule 14a-9. The defendants-appellees moved to dismiss on December 22, 2003. On May 17, 2004, the district court granted the defendants-appellees' motion. The district court concluded that Item 10 does not require a proxy statement to disclose the number of options that may be granted under a compensation plan, and ruled that the proxy statement is not materially misleading. For the reasons stated herein, we affirm.

Discussion

We review *de novo* a district court's grant of a motion to dismiss for failure to state a claim upon which relief can be granted. *See Resnik v. Swartz*, 303 F.3d 147, 150 (2d Cir.2002).

Seinfeld first argues that the proxy statement violates Item 10 of SEC Rule 14a-101, which specifies the information that must be included in a proxy statement describing a cash or noncash compensation plan. 17 C.F.R. § 240.14a-101 (Item 10). That rule requires such a proxy statement to set forth, *inter alia*, "[t]he title and amount of securities underlying such options." *Id.* (Item 10(b)(2)(i)(A)).

Attempting to skirt the straightforward language of the regulation, Seinfeld contends that we should read the term "amount of securities underlying . . . options," *id.*, to mean

"amount of options." She urges us to make this logical leap and then conclude that the proxy statement was deficient in that it failed to inform investors that a potentially limitless number of options could be issued under the Plan. We reject this argument. When Item 10 is intended to refer to options, it uses the word "options." The regulation states that, "[w]ith respect to any specific grant of or any plan containing *options*," a proxy statement must disclose "[t]he prices, expiration dates and other material conditions upon which the *options* . . . may be exercised," as well as "[t]he consideration received or to be received by the registrant or subsidiary for the granting or extension of the *options*." *Id.* (Item 10(b)(2)(i)) (emphases added). Moreover, when the regulation is intended to require disclosure of the *amount* of options, it again uses a form of that simple, straightforward term: "amount of options." In effecting its requirement that option compensation information be disclosed separately for certain individuals, such as executive officers and directors, the regulation requires the proxy statement to "[s]tate separately the amount of such options received or to be received by the following persons if such benefits or amounts are determinable." *Id.* (Item 10(b)(2)(ii)). This individual listing requirement, which clearly is intended to require the disclosure of the amount of options to be granted to each individual where determinable, does not use the term "amount of securities underlying options." *Id.* Thus, we cannot conclude that, in stating its general option disclosure requirement, the regulation used the term "amount of securities underlying . . . options," *id.* (Item 10(b)(2)(i)(A)), to mean "amount of options."

Instead, this term should be interpreted according to its plain meaning under the regulation. *See Resnik*, 303 F.3d at 151 (interpreting SEC compensation disclosure regulations and stating that "[i]n interpreting an administrative regulation, as in interpreting a statute, we must begin by examining the language of the provision at issue."); *N.Y. Currency Research Corp. v. Commodity Futures Trading Comm'n*, 180 F.3d 83, 92 (2d Cir.1999) (stating that "[c]onstruing a regulation is similar to interpreting a statute," and that "[o]ur first task is to ascertain the plain meaning" of the regulation). Item 10 plainly requires the disclosure of those securities that could be issued to satisfy Boeing's obligation to deliver shares under the Plan when an option-holder exercises options.

Here, the proxy statement informs investors that "[t]he aggregate number of shares of Boeing stock available for issuance under the 2003 Plan will not exceed 30 million." The proxy statement further explains that this number may be increased by three million shares if Boeing acquires another company. The Plan itself is attached to the proxy statement, and contains similar language. This disclosure adequately informs investors of the amount of securities that could be issued to satisfy Boeing's obligation to deliver shares under the Plan when an option-holder exercises options.

Seinfeld argues that we should ignore the straightforward language of Item 10, based on recent changes in accounting standards. According to the Verified Amended Complaint, Statement No. 123 of the Financial Accounting Standards Board ("FASB") suggests that the economic consequences

of granting options are best accounted for at the time of grant, and not the time of exercise. Seinfeld seizes on this standard to argue that shareholders are no longer concerned merely with the issuance of new shares when options are exercised, but instead, must be informed of the amount of options that could be granted under a compensation plan.

This Court has rejected this argument previously, however. In *Resnik*, a case in which the plaintiff was represented by the same lawyer representing the plaintiff at bar, this Court considered whether a proxy statement describing a stock option plan for non-employee directors was misleading because it did not disclose the grant-date value of stock options proposed to be awarded. *Resnik*, 303 F.3d at 149. This Court, affirming the district court's dismissal of the complaint, concluded that FASB Statement No. 123 "does not purport to address the requirements for reporting proposed compensation in a proxy statement."[3] *Id.* at 153. We see no reason to depart from *Resnik*'s holding here. It remains true that technical accounting standards governing the appropriate timing for recognition of revenues and costs simply do not change the SEC's straightforward regulations, including those laid out in Item 10, governing proxy statement disclosure.

---

3. Indeed, in her reply brief, Seinfeld acknowledges that *Resnik* held that the accounting principles "expressed in FASB 123 did not require disclosure in a proxy statement seeking stockholder approval by directors of the multi-million dollar stock options that they granted to themselves," and Seinfeld similarly acknowledged FASB 123's inapplicability during oral argument.

For these reasons, we conclude that the proxy statement does not violate Item 10 of SEC Rule 14a-101.[4]

Seinfeld claims to have a distinct second argument: that the proxy statement's limitation on the shares available for issuance under the Plan was materially misleading in violation of SEC Rule 14a-9. That rule provides that a proxy statement may not contain "any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading." 17 C.F.R. § 240.14a-9. Omission of information from a proxy statement is actionable "if either the SEC regulations specifically require disclosure of the omitted information in

4. Seinfeld also makes an argument based on Item 20 of Rule 14a-101. Item 20 states: "Other proposed action. If action is to be taken on any matter not specifically referred to in this Schedule 14A, describe briefly the substance of each such matter in substantially the same degree of detail as is required by Items 5 to 19, inclusive, of this Schedule. . . ." 17 C.F.R. 240.14a-101 (Item 20). In addition to stock options, the Plan provides for the award of "stock appreciation rights" and certain other benefits that are apparently different from stock options. Supplementing her claim regarding the disclosure relating to stock options, Seinfeld asserts that the proxy statement's treatment of stock appreciation rights and other awards was inadequate, because Item 20 required that they be addressed as provided for in Item 10. However, this argument fails for the same reason Seinfeld's argument regarding stock option disclosure fails: the proxy statement discloses the number of shares permitted to be issued for all of these awards, and makes clear that the limit on shares available for issuance in support of awards does not constrain the number of awards that might be granted, thus satisfying the requirements of Item 10.

a proxy statement, or the omission makes other statements in the proxy statement materially false or misleading." *Resnik*, 303 F.3d at 151. To succeed on a Rule 14a-9 material omission claim, "the plaintiff must show that there was 'a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.' " *United Paperworkers Int'l Union v. Int'l Paper Co.*, 985 F.2d 1190, 1198 (2d Cir.1993) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449, 96 S.Ct. 2126, 48 L.Ed.2d 757 (1976)).

Again, the proxy statement declares that the "number of shares of Boeing stock available for issuance under the 2003 Plan will not exceed 30 million," except that this number may be increased by 3 million if Boeing acquires another company. Seinfeld claims that this statement was misleading because it failed to state that the number of options that could be granted under the Plan was essentially unlimited. As counsel for Seinfeld acknowledged at oral argument, however, this argument is based on a premise similar to the first argument: that the terms "shares available for issuance under the Plan" should be read to have the same meaning as "options available for issuance under the Plan."

The language of the proxy statement is clear. The 33 million number limits only the shares that could be issued to satisfy Boeing's obligation to deliver shares under the Plan when an option-holder exercises options. Moreover, other language in the proxy statement highlights the fact that the number of options that might be issued under the Plan was not constrained by the Plan's limitation on the number of

shares. The proxy statement explains that "[s]hares covered by an Award will not count against the shares available for issuance under the 2003 Plan until they are actually issued and delivered to a Participant." This language further states that "[i]f an Award granted under the 2003 Plan . . . terminates . . . without the issuance of all of the shares subject to the Award, the shares covered by such Award will again be available for use under the 2003 Plan." If there were any doubt, this language makes evident that the number of options that could be granted under the Plan might greatly exceed the number of shares available for issuance. Thus, any specific disclosure that the number of options that could be granted under the Plan was unlimited would not " 'have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.' " *United Paperworkers*, 985 F.2d at 1198 (2d Cir.1993) (quoting *TSC Indus.*, 426 U.S. at 449, 96 S.Ct. 2126). For these reasons, the proxy statement was neither false nor misleading in violation of Rule 14a-9.

CONCLUSION

Accordingly, the district court's May 17, 2004 order granting the defendants-appellees' motion to dismiss is AFFIRMED.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED MAY 17, 2004

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

03 Civ. 7931 (CLB)

LEATRICE SEINFELD,

Plaintiff,

- against -

PAUL E. GRAY, JOHN F. MCDONNELL, JOHN M. SHALIKASHVILI, HARRY C. STONECIPHER, JOHN H. BIGGS, JOHN E. BRYSON, ROZANNE L. RIDGWAY, PHILIP M. CONDIT, KENNETH M. DUBERSTEIN, W. JAMES MCNERNEY, JR., LEWIS E. PLATT, AND THE BOEING COMPANY.

Defendants.

MEMORANDUM AND ORDER

Brieant, J.

By motion filed February 23, 2004 (Doc. # 20), heard and fully submitted on April 16, 2004, Defendants Paul E. Gray, John F. McDonnell, John M. Shalikashivili, Harry C. Stonecipher, John H. Biggs, John E. Bryson, Rozanne L. Ridgway, Philip M. Condit, Kenneth M. Duberstein,

Appendix B

W. James McNerney, Jr. and Lewis E. Platt move to dismiss the Amended Complaint for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. Pro. 12(b)(6).

Plaintiff Leatrice Seinfeld, a shareholder of The Boeing Company ("Boeing"), brings a stockholder derivative suit on Boeing's behalf against Boeing and its Board of Directors to recover for an allegedly false and misleading March 21, 2003 Proxy Statement ("Proxy Statement" or "PS") which solicited and obtained stockholder approval of Boeing's 2003 Incentive Stock Plan ("Plan"). Plaintiff filed an original Complaint on October 7, 2003 and an Amended Complaint on January 9, 2004. The Amended Complaint alleges that the Proxy Statement violated Section 14(a) and 17 C.F.R. § 240.14a-9 ("Rule 14a-9") of the Securities Exchange Act of 1934 ("Exchange Act") because it (1) failed to disclose the total number of shares underlying stock options and other stock based awards; (2) misrepresented or contained material omissions relating to the number of shares of Boeing stock that are available for issuance under the Plan; and (3) failed to disclose the estimated cost of stock options and other stock-based awards under the Plan.

Legal Analysis

When considering a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, this Court must interpret the allegations in the complaint in Plaintiff's favor. See *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686, 40 L.Ed.2d 90 (1974). Indeed, this Court must construe all reasonable inferences in favor of the Plaintiff

and may dismiss only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L.Ed.2d 80 (1957). Although a district court is generally limited to viewing the complaint, exhibits attached to the complaint and exhibits incorporated in the complaint by reference, a court may also "review and consider public disclosure documents required by law to be and which actually have been filed with the SEC." *Cortec Industries, Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2d. Cir. 1991).

"Section 14(a) makes it unlawful to solicit proxies "in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 78n(a). Rule 14a-9 provides that no proxy statement shall contain "any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading." Under Section 14(a) an omission is actionable if "either the SEC regulations specifically require disclosure of the omitted information in a proxy statement, or the omission makes other statements in the proxy statement materially false or misleading." *Resnik v. Swartz*, 303 F.3d 147, 151 (2d. Cir. 2002). A fact is considered material in a proxy statement "if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

Appendix B

Plaintiff alleges that the Proxy Statement is materially deficient because it fails to disclose the number of shares underlying options and other awards that could be granted under the Plan pursuant to 17 C.F.R. § 240.14a-101, Schedule 14A, (Item 10). Item 10(b)(2)(i)(A) provides that a proxy statement must disclose "[t]he title and amount of securities underlying such options, warrants or rights." Boeing's Proxy Statement disclosed the number of shares available for issuance under the Plan but did not disclose the number of options that may be granted.

The plain language of the regulation does not require a proxy statement to disclose the number of options that may be granted under a compensation plan. Plaintiff's contention that the "title and amount of securities underlying options" is equivalent to the "number of options" is rejected. Our Court of Appeals has distinguished options that may be granted from shares available for issuance:

> We tend to agree with the district court's view that a stockholder is concerned about the number of shares that may be issued to dilute his interest rather than about the number of options that may be granted with respect to a constant total number of shares.

Galef v. Alexander, 615 F.2d 51, 65 (2d Cir. 1980).

Although the opinion is not binding, the SEC Division of Corporate Finance has made this same distinction, stating that the requirement to disclose an amount of options under Item 10(b)(2)(ii) does not apply to new plans "because there

have been no grants under that new plan to report." *Manual of Publicly Available Telephone Interpretations*, SEC Division of Corporate Finance, § N, ¶ 38 (1997), available at *http://www.sec.gov/interps/telephone/1997manual.txt.*

Plaintiff next argues that the Proxy Statement is materially false and misleading concerning the number of shares available for issuance under the Plan in violation of Rule 14a-9. Under the heading "Shares Available for Issuance," the Proxy Statement states:

> The aggregate number of shares of Boeing stock available for issuance under the 2003 Plan will not exceed 30 million, which represents approximately 3.75% of the currently outstanding shares of Boeing stock eligible to vote as of February 28, 2003. The Board of Directors, in its sole discretion, may increase the aggregate number of shares of Boeing stock available for issuance under the 2003 Plan by an additional three million shares if, in the future, Boeing acquires another company and substitutes Awards for the acquired company's outstanding stock option or equity award commitments or otherwise grants awards in connection with the acquisition.

See PS at 25.

In the third and fourth paragraphs of this section, the Proxy Statement identifies certain circumstances that would adjust the number of shares available for issuance under the Plan. Despite the plain language of the Proxy Statement, Plaintiff

contends that the reasonable investor understood the Plan to mean that only "30, or maybe 33 million, shares were available to underlie awards under the Plan." Am. Compl. ¶ 19. Plaintiff's counsel made a similar argument in *Shaev v. Hampel*, 2002 WL 31413805 (S.D.N.Y. 2002) (Berman, J.), *aff'd by summary order*, *2003* WL 22139567 (2d. Cir. 2003). In *Shaev*, Plaintiff argued that it was materially misleading for the proxy statement to represent that only 14 million shares were available for issuance under the plan because other sections in the proxy statement indicated that the total number of options could be increased under specified circumstances. The Court held that "[n]o reasonable shareholder reading the entirety of the Proxy Statement would have believed that the Plan was authorizing only 14 million shares. . . . The Proxy Statement clearly discloses that additional shares could become available under three circumstances." As in *Shaev*, no reasonable investor would believe that only 30 or 33 million shares would be available for issuance under the Plan since the Plan clearly stated in the following two paragraphs that the number of shares could be adjusted under certain conditions.

Plaintiff also contends that although the Proxy Statement accurately reports that the 30 million shares available for issuance under the Plan represents 3.75% of the outstanding shares of Boeing stock eligible to vote as of February 28, 2003, this is materially misleading because it makes the Plan seem inexpensive and non-dilutive. Am. Compl. ¶ 19. This argument is without merit. All such plans are dilutive.

Finally, Plaintiff alleges that the Proxy Statement is false and misleading because it fails to disclose the cost of the Plan. Am. Compl. ¶ 21. Plaintiff admits that other cases,

including those decided by our Court of Appeals, have held that there is no duty to disclose the cost of a stock incentive plan by either the Black-Scholes option pricing model or a binomial model. She argues though that these cases did not address the provisions of 17 C.F.R. § 240.14a-101 (Item 10(a)(2)), concerning the dollar value of non-cash benefits, or the effect on companies such as Boeing that expenses stock-based compensation pursuant to FASB 123 as promulgated by the Financial Accounting Standards Board ("FASB"). Am. Compl, ¶ 24. The Court in *Shaev* specifically noted that at least six courts have rejected Plaintiff's argument that Section 14(a) and Rule 14a-9 require the disclosure of a Black-Scholes estimate of the Plan's cost, concluding that Black-Scholes valuations are not material as a matter of law. *Shaev v. Hampel*, 2002 WL 31413805, at *5 (S.D.N.Y. 2002) (Berman, J.). *See Resnick v. Swartz*, 2001 WL 15671 (S.D.N.Y. 2001) (McKenna, J.), *aff'd*, 303 F.3d 147 (2d. Cir. 2002); *Seinfeld v. Bartz*, 2002 WL 243597 (N.D.Cal. 2002); *In re 3Com Corp. Shareholder Litigation*, 1999 WL 1009210 (Del. Ch. 1999); *Cohen v. Calloway*, 246 A.D.2d 473, 667 N.Y.S.2d 249 (1st Dep't 1998); *Lewis v. Vogelstein*, 699 A.2d 327 (Del. Ch. 1997). This rule is particularly applicable in Boeing's Proxy Statement because at the time the Proxy Statement was issued no options had been granted under the Plan. Accordingly, disclosing the estimated cost of the Plan using the Black-Scholes or binomial option pricing model would be purely speculative as the six input variables necessary to perform the calculation were not yet known.[1]

1. The six input variables are the exercise price of the option, the market price of the underlying stock, the volatility of the underlying stock, the expiration date of the option, the risk-free rate of interest, and the dividend rate on the underlying stock. See *Resnick v. Swartz*, 303 F.3d 147, 150 (2d. Cir. 2002).

Appendix B

Conclusion

Defendants' motion to dismiss the Amended Complaint is granted. The Clerk shall file a final judgment.

SO ORDERED.

Dated: May 17, 2004
White Plains, New York

CHARLES L. BRIEANT
Charles L. Brieant, U.S.D.J.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING FILED AUGUST 24, 2005

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Roseann B. MacKechnie
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 24 day of August two thousand five.

04-3475

Leatrice Seinfeld,

Plaintiff-Appellant,

v.

Paul E. Gray, John F. McDonnell, John M. Shalikashvili, Harry C. Stonecipher, John Biggs, John E. Bryson, Rozanne L. Ridgway, Phillip M. Condit, Kenneth M. Duberstein, W. James McNerney, Lewis E. Platt, The Boeing Company,

Defendants-Appellees.

Appendix C

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the Appellant Leatrice Seinfeld. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,
Roseann B. MacKechnie, Clerk

By: s/ [illegible]
Motion Staff Attorney

APPENDIX D — STATUTORY AND REGULATORY PROVISIONS INVOLVED

15 U.S.C. § 78n

§ 78n. Proxies

(a) Solicitation of proxies in violation of rules and regulations

It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 78l of this title.

* * * *

Appendix D

17 C.F.R. § 240.14a-101

§ 240.14a-101. Schedule 14A. Information required in proxy statement.

* * *

Item 10 (b)(2)(i) With respect to any specific grant of or any plan containing options, warrants or rights submitted for security holder action, state:

(A) The title and amount of securities underlying such options, warrants or rights;

(B) The prices, expiration dates and other material conditions upon which the options, warrants or rights may be exercised;

(C) The consideration received or to be received by the registrant or subsidiary for the granting or extension of the options, warrants or rights;

(D) The market value of the securities underlying the options, warrants, or rights as of the latest practicable date; and

(E) In the case of options, the federal income tax consequences of the issuance and exercise of such options to the recipient and the registrant; and

Item 10 (b)(2)(ii) State separately the amount of such options received or to be received by the following persons if such benefits or amounts are determinable:

* * *

Appendix D

Item 20. Other proposed action. If action is to be taken on any matter not specifically referred to in this Schedule 14A, describe briefly the substance of each such matter in substantially the same degree of detail as is required by Items 5 to 19, inclusive, of this Schedule, and, with respect to investment companies registered under the Investment Company Act of 1940, Item 22 of this Schedule

* * * *

SEC Release No. 34-4775 (Item 11) (December 11, 1952)

Item 11. Options, Warrants, or Rights.

* * *

If action is to be taken with respect to the granting or extension of any options, warrants or rights to purchase securities of the issuer or any subsidiary, furnish the following information:

(a) State (i) the title and amount of securities called for or to be called for by such options, warrants or rights; (ii) the prices, expiration dates and other material conditions upon which the options, warrants or rights may be exercised; (iii) the consideration received or to be received by the issuer or subsidiary for the granting or extension of the options, warrants or rights; and (iv) the market value of the securities called for or to be called for by the options, warrants or rights, as of the latest practicable date.

Appendix D

(b) State separately the amount of options, warrants or rights received or to be received by the following persons, naming each such person: (i) each director or officer named in answer to item 7(a); each nominee for election as a director of the issuer; (iii) each associate of such directors, officers or nominees; and (iv) each other person who received or is to receive 5% or more of such options, warrants or rights. State also the total amount of such options, warrants or rights received or to be received by all directors and officers of the issuer as a group, without naming them.

(c) Furnish such information, in addition to that required by this item and item 7, as may be necessary to describe adequately the provisions already made pursuant to all bonus, profit sharing or other remuneration or incentive plans for (i) each director or officer named in answer to item 7(a) who will participate in the plan to be acted upon; (ii) all directors and officers of the issuer as a group; and (iii) all employees.

Instruction. Paragraphs (b) and (c) do not apply to warrants or rights to be issued to security holders as such on a pro rata basis.

* * * *

Appendix D

SEC Release No. 34-1823 (Item 9(d)) (August 11, 1938)

* * *

Item 9. If action is to be taken with respect to the authorization or issuance of any securities, otherwise than in exchange for outstanding securities of the issuer—

* * *

(d) If the transaction is to involve the granting by the issuer of options to purchase any of the securities, furnish the following additional information as to each such option:

(1) The amount of securities called for by the option;

(2) The price, expiration date, and other material terms and conditions on which the option may be exercised; and

(3) The consideration received or to be received for the option.

* * * *

APPENDIX E — TRANSCRIPT OF CHAIRMAN COX'S INTERVIEW PORTION ON NIGHTLY BUSINESS REPORT ON AUGUST 10, 2005

08/10/05: One On One With SEC Chairman Christopher Cox

JEFF YASTINE: After less than a week on the job, Christopher Cox is beginning to make his mark as the head of the Securities and Exchange Commission. One of his first goals is to give investors more information, helping shareholders to police the companies they own. Stephanie Dhue talked with Cox today at his office in Washington, DC.

STEPHANIE DHUE, NIGHTLY BUSINESS REPORT CORRESPONDENT: It's day five for Christopher Cox in his new job at the Securities and Exchange Commission. The nine-term Republican congressman can still see his old digs from his new office. He's spending his first days getting to know the people and the issues. Cox says his experience as the chairman of the committee on homeland security is helping him assess some of the issues facing the SEC.

CHRISTOPHER COX, CHAIRMAN, SEC: The SEC is of course a part of the president's working group on financial markets and in that capacity working with the Treasury, working with the Fed, working with other government agencies. We're trying to find ways to make sure that terrorists can't operate inside our country, move money abroad. But also we're interested in making sure that our markets can recover as was necessary after September 11 from future terrorist attacks.

DHUE: What are your top goals for the SEC?

Appendix E

COX: The Securities and Exchange Commission is going to remain focused on investor protection. We are the investors' advocate. Our enforcement responsibilities are chief among the tools that we have to protect investors, but in addition, we're focused on better disclosure and more useful disclosure. As we go forward, increasingly the Securities and Exchange Commission is going to find ways to learn from investors both big and small what kinds of disclosure would be better for them. We're also going to look at ways that the Internet and new technology and information technology and communications technology can make our disclosure mission even more meaningful for investors.

DHUE: Your predecessor, Bill Donaldson, took what he called a risk-based approach and tried to move the agency to looking at anticipating problems and focusing there. Will you take a similar approach?

COX: This idea of being able to look over the horizon and around the corner is very, very important to make sure that our resources at the Securities and Exchange Commission and law enforcement wide are focused where they should be, not on problems of 30, 50 years ago but problems of now and next year. The UK has been very, very good at this and we're going to share our regulatory experiences over the Atlantic and make sure that our best practices are up to standards.

DHUE: Runaway executive pay has long been criticized. Is that something that the agency is going to take out>?

COX: Executive compensation is much in the news and there have been some very notorious cases of apparent excess. It should be, of course, in the main up to shareholders to

discipline that kind of activity, but in order for shareholders to do that, they've got to have good information. I think you can look in the near future to the SEC for some improved rules on disclosure to make sure that, for example, shareholders can have one number, that the different kinds of executive compensation add up to a number that's comparable executive to executive and company to company and at the same time that this information is provided in a timely way before rather than after the fact.

DHUE: Shareholder activists have also tried to rein in executive pay through the proxy process. Do shareholders need greater access to the proxy so they can be the watchdog on corporate management?

COX: Of course investors and particular equity owners own the company and it's very much in shareholder interests to discipline executive compensation and make sure it's in line with the market, making sure they're getting full value and also to make sure that everything else about the company is running well and with a view to doing well and good at the same time. Shareholders, I think, will find it increasingly easy going forward to look after their interests because technology is making it possible for information to move so much more quickly. We can have better analysis, more cheaply in the hands of investors more quickly than ever before. And the SEC is going to look at every possible way of making sure that our disclosure requirements are up to date and providing investors what they truly need.

DHUE: Chairman Chris Cox, thank you.

COX: Good to join you.

No. 05-666

IN THE

Supreme Court of the United States

LEATRICE SEINFELD,

Petitioner,

v.

PAUL E. GRAY, JOHN F. MCDONNELL, JOHN M. SHALIKASHVILI, HARRY C. STONECIPHER, JOHN BIGGS, JOHN E. BRYSON, ROZANNE L. RIDGWAY, PHILIP M. CONDIT, KENNETH M. DUBERSTEIN, W. JAMES MCNERNEY, LEWIS E. PLATT, AND THE BOEING COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Should the Petition for a Writ of Certiorari be denied because the only issue presented is a request for this Court to interpret the word "underlying" in Schedule 14A (Item 10(b)(2)(i)(A)), 17 C.F.R. § 240.14a-101, and (i) the issue was not presented below; (ii) the plain language of the regulation is clear and unambiguous on its face; (iii) no conflict regarding the meaning of the word "underlying" exists; (iv) no federal question of importance is presented; and (v) the decision of the lower court is correct.

STATEMENT PURSUANT TO RULE 29.6

Respondent, The Boeing Company, has no parent corporation and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

Background Facts.

On March 21, 2003, The Boeing Company ("Boeing" or the "Company") filed a proxy statement ("Proxy Statement") with the Securities and Exchange Commission ("SEC"), soliciting stockholder approval of, *inter alia*, a new stock incentive plan ("Plan"). (Pet'r App. 13a.) The Proxy Statement disclosed that: (i) several aspects of the Plan's administration are discretionary and that discretion is generally vested in the Compensation Committee of the Board of Directors; (ii) the Plan authorizes the Committee to grant various types of awards, including stock options, restricted stock, stock units, performance shares, performance units, and other awards based on Boeing stock (collectively, "Awards") (C.A. App. A99-A100); and (iii) the Plan authorizes the Committee to settle Awards in cash. (Pet'r App. 4a)

In a section entitled "Shares Available for Issuance," the Proxy Statement expressly disclosed that the "title of securities" to be issued under the Plan is "shares of Boeing stock" and that the number of shares available for issuance is 30 million, subject to adjustment in the event of a change in the Company's stock, such as a stock split. (*Id.* 3a-4a.) The Proxy Statement also disclosed that the number of shares available for issuance could be increased to 33 million by the Board "if, in the future, Boeing acquires another company and substitutes Awards for the acquired company's outstanding stock option or equity award commitments or otherwise grants Awards in connection with the acquisition." (*Id.* 3a.)

The Proxy Statement further disclosed that "[s]hares covered by an Award will not count against the shares available for issuance . . . *until they are actually issued and delivered to a Participant*." (*Id.* 4a (emphasis added).) To clarify the operation of this counting method, the Proxy Statement also explicitly explained its corollary, *i.e.*, "[i]f an Award granted under the 2003 Plan lapses, expires, terminates, or is forfeited, surrendered or canceled without having been fully exercised or without the issuance of all of the shares subject to the Award, the *shares covered by such Award will again be available for use under the 2003 Plan.*" (*Id.* (emphasis added).) On April 28, 2003, the Company's shareholders approved the Plan. (C.A. App. A23-A24.)

Procedural History.

Petitioner, Leatrice Seinfeld, a stockholder of the Company, originally brought this action, derivatively, against the Company and its directors (the "Directors") in the Federal District Court for the Southern District of New York. (Pet'r App. 12a-13a.) Seinfeld's Amended Complaint claimed the Proxy Statement violated Section 14(a) of the Securities Exchange Act, 15 U.S.C. § 78n(a), and Rule 14a-9 ("Rule 14a-9") promulgated thereunder, because (i) it failed to disclose the number of options that could be granted under the Plan in alleged violation of Schedule 14A (Item 10(b)(2)(i)(A)), 17 C.F.R. § 240.14a-101 ("Item 10(b)(2)(i)(A)"),[1] and (ii) its

1. In relevant part, Item 10(b)(2)(i)(A) states: "With respect to any specific grant of or any [compensation] plan containing options, warrants or rights submitted for security holder action," the proxy statement must disclose "[t]he title and amount of securities underlying such options, warrants or rights." 17 C.F.R. § 240.14a-101 (Item 10(b)(2)(i)(A)).

accurate disclosures regarding the number of *shares* available for issuance under the Plan allegedly misled the stockholders to believe that there was a fixed number of *options* that could be granted under the Plan. (Pet'r App. 13a.)[2]

On February 23, 2004, Boeing and the Directors moved to dismiss the Amended Complaint. (*Id.* 12a.) Boeing and the Directors argued that the plain language of Item 10(b)(2)(i)(A) does not require a company to delimit and disclose the number of options that can be granted over the life of a proposed new plan. (*See id.* 5a-6a.) Rather, Item 10(b)(2)(i)(A) requires only that a proxy statement soliciting approval of a new compensation plan disclose the "title and amount of securities underlying" the awards that can be granted under the plan.[3] (*Id.*) Boeing and the Directors further argued that, with respect to the number of shares available for issuance and the number of options that could be granted under the Plan, the Proxy Statement was not false or misleading because it fully disclosed that: (i) the number of shares could be increased and the circumstances that could give rise to such an increase, (ii) awards could be settled in

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2. Seinfeld also alleged that (i) the Proxy Statement failed to disclose the estimated cost of the Plan and (ii) the Proxy Statement was misleading. (*See* Pet'r App. 16a-18a.) The district court rejected these arguments, the Second Circuit affirmed, and neither of these issues were raised in the Petition for Writ of Certiorari. (*Id.* 5a, 16a-18a; Pet. i.)

3. On its face, Item 10(b)(2)(i)(A) only requires disclosure of the amount of securities underlying options, warrants and rights. However, Seinfeld argued that Item 20 of Schedule 14a expanded the scope of Item 10(b)(2)(i)(A) to include securities underlying all types of stock based awards that could be granted. (*See* Pet'r App. 9a n.4.) The Directors' and Boeing's motion to dismiss assumed, *arguendo*, that Seinfeld's characterization of Item 20 was correct. (*Id.*)

cash, (iii) shares covered by an award would not be counted against the number of shares available for issuance until they are actually issued and delivered, and (iv) shares underlying awards that are forfeited, terminated or expire unexercised, can be reused. (Pet'r App. 16a-17a.) On May 17, 2004, the court granted this motion. (*Id.* 19a.)

Seinfeld filed her Notice of Appeal to the Second Circuit Court of Appeals on June 15, 2004. (C.A. App. A348.) She argued that the district court erred because (i) Item 10(b)(2)(i)(A) should be interpreted as requiring the disclosure of the number of options or other awards that can be granted under a new compensation plan (Pet'r App. 5a-6a), and (ii) the Proxy Statement was misleading because it failed to state that the number of options that could be granted under the Plan was essentially unlimited. (*Id.* 10a.)

The Second Circuit affirmed. Like the district court, the appellate court rejected both of Seinfeld's contentions. It ruled that the plain language of Item 10(b)(2)(i)(A) does not require disclosure of the "amount of options" that can be granted under a new compensation plan. (*Id.* 5a-6a.) The court also held that the Proxy Statement's language was not misleading. (*Id.* 10a.)

On April 28, 2005, Seinfeld filed a petition for rehearing *en banc*, which the lower court denied on August 24, 2005.[4]

4. Seinfeld's Petition for Rehearing *En Banc* raised for the first time the issue raised herein, *i.e.*, the allegedly important definition of the term "underlying" in Item 10(b)(2)(i)(A). Because the issue was not raised properly or in a timely fashion, the court below was precluded from considering it. *Hoover v. Ronwin*, 466 U.S. 558, 574 n.25 (1984) (ruling that an argument presented by respondent "for (Cont'd)